U.S. Department of Justice

Environment and Natural Resources Division

90-11-3-1563/1

Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

Telephone (202) 514-0133
Facsimile (202) 616-2427

July 9, 2004

VIA FACSIMILE & U.S. MAIL

Antoinette R. Stone, Esq.
BUCHANAN INGERSOLL, P.C.
11 Penn Center, 14th Floor
1835 Market Street
Philadelphia, PA 19103-2985
(215) 665-3819
fax (215) 665-8760

Re: *United States & NJDEP v. Chemical Waste Management, Inc., et al.*, No. 02-2077 (D.N.J.)

Dear Antoinette:

I am writing in response to your letter of July 2, 2004, regarding my e-mail of July 1, 2004, in which I expressed concern that Waste Management had reneged on its agreement to pay the agreed-upon settlement amounts into an interest-bearing court registry account by May 14, 2004.

Contrary to the implication in your letter, the inclusion of prejudgment interest does not "penalize" anyone. As I wrote in my letter to you of April 2, 2004, prejudgment interest merely *preserves* the agreed-upon value of the settlement. Only the *omission* of prejudgment interest penalizes, and the party prejudiced thereby is the United States not Waste Management. Hence, a prejudgment interest provision is standard boilerplate language in the United States' publicly available past-cost model consent decree, among others, with which I am sure you are familiar, and with which – as we have made clear from the beginning – any settlement in this case must substantially conform.

Contrary to another implication in your letter, the prejudgment interest issue has nothing to do with when the settlement is finalized; it has to do with when the accrual of interest commences.[1] If interest began accruing on the date of the settlement in principle, the real value of the agreed-upon settlement would be preserved. If, as you agreed, the settlement monies had

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[1] Your suggestion that the Government has not been working diligently toward a settlement of this case is not only irrelevant, it is also inaccurate for several reasons. First, the United States has produced more settlement work product, and has done so earlier, than counsel for any other Party. Second, the issues affecting the Government in this case are more numerous and complicated than those affecting Waste Management. Finally, the time it has taken to resolve those issues has been extended due at least in part to other Parties, for example, the schedules of Transtech counsel and consultants as explained to us and to the Court. In short, the Settling Defendants are at least as responsible as the Government for any perceived delays in the negotiation process. Moreover, any additional costs borne by Waste Management as a result are more than offset by savings from its reliance on others for settlement research and drafting.

been placed in an interest-bearing court registry account by May 14, the value of the settlement would have been reduced by approximately $17,300 (1/2 of a year x 1.27% FY2004 Superfund interest rate w/o compounding x $2.725 million). If a prejudgment interest provision had been included in the Consent Decree specifying the commencement of accrual of interest on that date, the effect would have been the same. If interest were to begin accruing today (through payment into an interest-bearing account or through inclusion in the Decree of a prejudgment interest provision), the reduction in the real value of the settlement would be $23,000 (2/3 of a year x 1.27% interest rate w/o compounding x $2.725 million).[2]

As one of a number of compromises made by the United States in the course of our negotiations, we agreed to recommend that the United States omit the standard model prejudgment interest provision from the Consent Decree, *provided that* the Parties execute a court registry stipulation and proposed order providing for prejudgment interest – and for the return of the account proceeds with interest in the even the settlement is not finalized – on or about May 16, 2004, when it was first served upon all Parties. That did not happen.[3] We are indifferent as to the vehicle for the accrual of prejudgment interest (Decree provision, escrow account, or court registry account); we are not indifferent as to its timing.[4]

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[2] In your letter, you do not deny that you promised to make the payment by May 14. Instead, you add a qualification to the promise *post hoc* that the parties first "reach[] agreement on the settlement documents." However, as I stated in my July 1 e-mail, you must have known at the time of your agreement that by mid-May there would not yet be agreement by all Parties to all language of every settlement document in this case. Indeed, as we have discussed, while the Government typically signs Consent Decrees prior to lodging, it cannot finally "agree" to its terms and entry until it has considered any comments submitted during the subsequent 30-day statutory public notice and comment period. In any case, the signed December 12 Settlement in Principle, our representations to the Court at our April 30 settlement conference, and the provision in the proposed court registry order for return of the account proceeds with interest in the event the settlement is not finalized were more than sufficient as a basis for Waste Management and the other Parties to capitalize the court registry account.

[3] To date, only counsel for Inmar Associates has signed the stipulation and proposed order, on June 29. Counsel for the other Parties should follow his lead without further delay.

[4] Your suggestion that if Waste Management were to honor its agreements and capitalize the court registry account, it would somehow eliminate any incentive for the Government to "wrap up" this case is absurd. First, as you yourself point out, this issue is a distraction that is prolonging and complicating, not facilitating, a settlement. Second, the United States would continue to have a strong incentive to finalize a resolution, in order to obtain and use the settlement funds and to free up scarce enforcement and administrative resources. Finally, rather than eliminate positive incentives, capitalizing the escrow would eliminate the *negative* incentives of Settling Defendants (including Transtech as well as Waste Management) to delay negotiations so as to maximize their interest income from the settlement monies they agreed to pay months ago.

By continuing to eschew the escrow and court registry vehicles, Waste Management and the other non-paying Parties are making a prejudgment interest Decree provision the only vehicle by which we can ensure that the date of interest commencement – and, therefore, the real value of the settlement – will be anything close to that originally envisioned. In short, the longer it takes to place the settlement funds in an interest-bearing account, the harder it becomes for us to justify to our managements the exclusion from the Consent Decree of the standard, model prejudgment interest provision.

If you still desire the omission of such standard prejudgment interest language, we strongly urge you to execute the court registry stipulation and proposed order, and to capitalize the court registry account, as soon as possible.

Thank you for your prompt attention to this matter.

Yours truly,

David L. Weigert, Esq.
U.S. Department of Justice
Environmental Enforcement Section

cc: James M. Andrews, Esq.
Michael K. Mullen, Esq.
James O'Toole, Esq.
William C. Tucker, Esq.